Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ABDON IBARRA,

Petitioner,

v.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, TERESA ISAAC & ALAYNE WHITE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two questions are presented for review:

1. Under *Garcetti v. Ceballos*, 547 U.S. ____, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); is the public employee's speech exempted from First Amendment protection when speech of public concern is printed in the local newspapers, is indirectly related to the public employee's employment but is not undertaken in furtherance of the public employee's required job duties, and when there is room for serious debate as to the scope of the employee's job duties?

2. Under *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), and the well established summary judgment standards contained within Fed.R.Civ.P. Rule 56, can an appellate court rely on genuine disputed material issues of fact, i.e., the required job duties of a public employee, to support its decision affirming the district court's grant of summary judgment on a public employee's First Amendment retaliatory discharge claim under *Garcetti v. Ceballos*, 547 U.S. ____, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006)?

RULE 14.1(b) LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner: Abdon Ibarra.

Defendants-Appellees and Respondents: Lexington-Fayette Urban County Government, Teresa Isaac and Alayne White.

CORPORATE DISCLOSURE STATEMENT

Abdon Ibarra is a citizen of the United States of America.

Lexington-Fayette Urban County Government is a local governmental entity under the Kentucky Constitution. Teresa Isaac and Alayne White are citizens of the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Abdon Ibarra ("Ibarra") respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The mandate dated July 13, 2007 issued by the United States Court of Appeals is reproduced at App. A, 1a-2a. The order of the United States Court of Appeals for the Sixth Circuit denying Ibarra's petition for rehearing and rehearing en banc dated July 5, 2007 is reproduced at App. B, 3a-4a. The per curiam opinion of the United States Court of Appeals for the Sixth Circuit dated February 23, 2007, is unofficially reported at 2007 U.S. App. Lexis 4895 (6th Cir. 2007) (unpublished), affirming the judgment of the district court granting summary judgment to Lexington-Fayette Urban County Government, Teresa Isaac and Alayne White and dismissing the complaint in the case at bar and is reproduced at App. C, 5a-13a.

The Memorandum Opinion and Order of the United States District Court for the Eastern District of Kentucky, dated May 4, 2006, granting summary judgment to Lexington-Fayette Urban County Government, Teresa Isaac and Alayne White and dismissing the complaint in the case at bar is reproduced at App. D, 14a-29a. The Judgment of the United States District Court for the Eastern District of Kentucky, dated May 4, 2006, dismissing the complaint in the case at bar is reproduced at App. E, 30a-31a. The Memorandum Opinion and Order of the United States District Court for the Eastern District of Kentucky, dated November 4, 2004, granting in part and denying in part the motion to dismiss of Lexington-Fayette Urban County Government, Teresa Isaac

and Alayne White in the case at bar is reproduced at App. F, 32a-44a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on February 23, 2007 and the order denying the petition for rehearing and rehearing en banc was entered on July 5, 2007 in the case at bar. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1, 3 because it is being filed within 90 days of the entry of the order denying the petition for rehearing and rehearing en banc of the opinion and judgment sought to be reviewed by this Court. This court has jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (App. I, 49a).

Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. (App. I, 49a-50a).

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (App. J, 51a).

STATEMENT OF THE CASE

Ibarra filed suit in this District Court to redress violations by the Respondents of his rights under the First and Fourteenth Amendments to the Constitution of the United States pursuant to 42 U.S.C. § 1983 and under the laws of Kentucky pursuant to pendent jurisdiction. Specifically, Ibarra alleged in his action that the Respondents while acting under the color of statute, ordinance, regulations, customs or usage retaliated against him in his employment and retaliated against him after terminating his employment, thereby depriving Ibarra of his rights, privileges and immunities secured to him by the First and Fourteenth Amendments to the Constitution, namely the right to exercise freedom of speech and freedom of association. Ibarra further claimed that after terminating his employment Respondent Isaac further committed the torts of slander per se and intentional infliction of emotional distress in violation of Kentucky case law which caused him to suffer damages. (District Court's Record, (hereinafter "R") R.3, Amended Complaint, pp.1-15). In response to Ibarra's Amended Complaint, Respondents filed their motion to dismiss, pursuant to Fed.R.Civ.P. 12(b) (6) alleging Ibarra had failed to state a cause of action upon which relief could be granted. (R.9, Defendants' Motion to Dismiss and Memorandum in Support of Motion to Dismiss). Ibarra filed his timely response opposing said motion. (R.10, Plaintiff's Response and Memorandum in Opposition to Defendants' Motion to Dismiss). Respondents filed their timely reply. (R.11, Defendants' Reply). The District Court granted Respondents' motion in part by dismissing all of Ibarra's claims with prejudice with the exception of Ibarra's 42 U.S.C. Section 1983 First Amendment retaliation claim. (*See* Memorandum Opinion and Order dated November 4, 2004, App. F, 32a-44a).

Respondents' Answer to Ibarra's Amended Complaint was filed on December 4, 2004. (R.14). The parties undertook extensive discovery. On January 31, 2006, Respondents moved for summary judgment on the issue of liability as to Ibarra's First Amendment claim asserting that Ibarra could not establish a causal link between protected speech and his subsequent termination of employment. (R.26, Defendants' Motion for Summary Judgment on Liability and Memorandum in Support of Defendants' Motion for Summary Judgment on Liability). On February 28, 2006, Ibarra timely filed his response setting forth the causal link between his protected speech and his subsequent termination of employment. (R.32, Plaintiff's Response to Motion of Defendants for Summary Judgment). The District Court found that Ibarra could not link his protected speech with his subsequent termination of employment and granted summary judgment to Respondents on May 4, 2006, by Memorandum Opinion and Order (R.38, App. D, 14a-29a), and by Judgment (R.39, App. E, 30a-31a), thereby dismissing Ibarra's case in full with the entry of a final and appealable judgment. Ibarra timely filed his Notice of Appeal to the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) on May 19, 2006 (R.42).

In the Sixth Circuit, Ibarra made four (4) arguments for reversal of the District Court. Specifically, he argued the following: (a) that the District committed reversible error in granting Respondents' summary judgment on his First Amendment claim of retaliation related to the exercise of his Free Speech under the First Amendment by holding that he could not establish a causal link between his protected speech and his subsequent termination of employment; (b) that the District Court failed to follow established summary judgment procedure by failing to construe the evidence of record in the light most favorable to him and by failing to draw the

reasonable inferences from said evidence in his favor and by otherwise having simply discounted or misconstrued evidence favorable to him that established both causation and the pretextual nature of Respondents' purported reasons for his termination; (c) that the District Court failed to fully consider all the factual averments of his Amended Complaint and the inferences to be drawn therefrom in the light most favorable to him in violation of standard FRCP 12(b)(6) practice in granting Respondents' Motion to Dismiss his First Amendment Claims of Freedom of Association; and (d) that the District Court mischaracterized the nature of the objectionable speech, regarding same under general defamation principles and further failed to consider the factual averments of his Amended Complaint and failed to apply the inferences to be drawn therefrom in the light most favorable to him in violation of standard Fed.R.Civ.P. 12(b) (6) practice in granting Respondents' Motion to Dismiss his state law claim of slander per se.

On February 23, 2007, the Sixth Circuit issued a per curiam decision affirming the judgment of the District Court granting summary judgment to the Respondents. The Sixth Circuit held that the comments made by Ibarra constituted no more than a part of the performance of the tasks that he was hired and paid to complete. Therefore, his speech was not subject to constitutional protection in light of *Garcetti v. Ceballos*, 547 U.S. __, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). (Per Curiam Opinion, App. C, 5a-13a).

On March 9, 2007, Ibarra filed his Petition for Rehearing and Rehearing En Banc in the Sixth Circuit raising the following issues: (a) the panel's decision as to his First Amendment retaliatory termination claim relies on a genuine disputed issue of material fact, i.e., the extent of Ibarra's required job duties was and is genuinely disputed by Ibarra

and the Respondents and, thereby, contravenes well established standards of appellate review as well as the summary judgment standards contained within Fed.R.Civ.P. Rule 56 and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); and, (b) the panel's decision as to his First Amendment retaliatory termination claim conflicts with decisions of the United States Supreme Court that recognize constitutional protection afforded to governmental employees who speak out on matters of public concern not involving personal interests and that are not within the scope of the employee's required job duties citing *Garcetti, supra*; *City of San Diego v. Roe,* 543 U.S. 77, 123 S. Ct. 521, 160 L. Ed.2d 410 (2004); *United States v. National Treasury Employees Union,* 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995); *Rankin v. McPherson,* 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d. 619 (1979); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

On July 5, 2007, the Sixth Circuit issued its Order denying Ibarra's said petition stating in relevant part the following: "The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied." (Order, App. B, 3a-4a). On July 13, 2007, the Sixth Circuit issued its mandate in the case at bar. (Mandate, App. A, 1a-2a).

Now, Ibarra respectfully petitions this Court for review of the Sixth Circuit's decision holding that his speech is not entitled to the protection afforded a public employee under the First and Fourteenth Amendments to the United States Constitution under *Garcetti, supra*.

Further, Ibarra respectfully petitions this Court for review of the Sixth Circuit's decision as to his retaliatory termination claim under the First and Fourteenth Amendments to the United States Constitution affirming the District Court's grant of summary judgment to the Respondents.

REASONS FOR GRANTING THE PETITION

In *Garcetti v. Ceballos*, 547 U.S. ____, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), the parties did not dispute that the deputy district attorney's memorandum was part of his official duties. Thus, this Court had **"no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate."** (Emphasis added). *Id.*, 126 S.Ct. at 1961. The Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits and various lower courts, however, have begun tackling this issue. This Court can provide the much needed guidance by resolving this issue once and for all. The case sub judice provides this Court with an excellent occasion to articulate a comprehensive framework for defining the scope of employee's duties. Ibarra and the Respondents genuinely dispute the scope of his job duties, thereby, providing room for serious debate as to the scope of Ibarra's job duties. **Also, the Respondents admitted in testimony that Ibarra was never given, verbally or in writing, any written job description or job requirements (R.33, White dep., Vol. I., pp. 176-177; Vol. III, pp. 531-532).**

Moreover, review by this Court is necessary to address and to correct the Sixth Circuit's decision in the case at bar because it conflicts with this Court's decision in *Garcetti, supra*. The Sixth Circuit's decision applied an unwarranted and overly expansive interpretation of *Garcetti, supra*, beyond the holding of this Court. Thus, the Sixth Circuit's decision in the case at bar makes consideration by this Court of utmost importance in order to secure and maintain uniformity in the Court's decisions.

Additionally, review by this Court is necessary to address and to correct the Sixth Circuit's departure from the Fed.R.Civ.P. Rule 56 and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The Sixth Circuit's decision departs from the accepted and usual standards for granting summary judgment in the usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

I. THIS COURT HAS AN EXCELLENT OCCASION TO ARTICULATE A COMPREHENSIVE FRAMEWORK FOR DEFINING THE SCOPE OF AN EMPLOYEE'S DUTIES LEFT UNANSWERED IN *GARCETTI*.

As noted earlier above, the parties did not dispute that the deputy district attorney's memorandum was part of his official duties in *Garcetti v. Ceballos*, 547 U.S. ____, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). And, this Court had **"no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate."** (Emphasis added). *Id.*, 126 S.Ct. at 1961.

However, the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits and various lower courts have begun tackling this issue. See, *Skehan v. Village of Mamaroneck*, 465 F.3d 96 (2nd Cir., 2006); *Cioffi v. Averill Park Central School Dist.*, 444 F.3d 158 (2nd Cir., 2006); *Foraker v. Chaffinch*, No. 06-4086 (3rd Cir. 8/30/2007); *Hill v. Borough of Kutztown*, 455 F.3d 225, 242 (3d Cir.2006); *Campbell v. Galloway*, 483 F.3d 258 (4th Cir., 2007); *Williams v. Dallas Independent School District*, 480 F.3d 689 (5th Cir. 2007); *Weisbarth v. Geauga Park District*, U.S. Court of Appeals, Case No. 06-4189 (6th Cir. 8/24/2007); *Mills v. City of Evansville*, 452 F.3d 646, (7th Cir. 2006); *Bailey v. Department of Elementary*, 451 F.3d 514 (8th Cir., 2006); *Bradley v. James*, 479 F.3d 536 (8th Cir., 2007); *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006); *Green v. Board of County Commissioners*, 472 F.3d 794 (10th Cir.2007); *Casey v. West Las Vegas Independent School District*, 473 F.3d 1323 (10th Cir. 2007); *Battle v. Board of Regents*, 468 F.3d 755 (11th Cir.2006); *D'Angelo v. School Board of Polk County*, U.S. Court of Appeals, Case No. 06-13582 (11th Cir. 8/29/2007); *Wilburn v. Robinson*, 480 F.3d 1140 (D.C. Cir., 2007); *Boykin v. City of Baton Rouge*, 439 F.Supp.2d 605 (M.D. La. 2006); *Levy v. Office of the Legislative Auditor*, 459 F.Supp.2d 494 (M.D. La. 2006); *Ryan v. Shawnee Mission Unified School District*, 512 F.Supp.2d 1233 (D. Kan. 2006).

On the other hand, the case sub judice involves a serious dispute between the parties as to Ibarra's job duties. The evidence as to Ibarra's job responsibilities was highly disputed in both the pleadings and the testimony. Furthermore, the Respondents admitted in testimony that Ibarra was never given, verbally or in writing, any written job description or job requirements (R.33, White dep., Vol. I., pp. 176-177; Vol. III, pp. 531-532). In other words, the speech activities

engaged in by Ibarra and which formed a significant basis for his termination were activities **not** part and parcel of any job duties with the Lexington-Fayette Urban County Government (hereinafter referred to as LFUCG).

Additionally, Ibarra respectfully requests this Court to compare the facts of his case to *Williams*, *supra*; *Weisbarth*, *supra*; *Mills*, *supra*; *Freitag*, *supra*; *Green*, *supra*; *Battle*, *supra*; *D'Angelo*, *supra*; *Boykin*, *supra*; *Levy*, *supra*; *Ryan*, *supra*, as additional support for his position that his case provides this Court with an excellent occasion to articulate a comprehensive framework for defining the scope of public employees' duties.

By granting review in this case, this Court can provide much needed guidance to the lower courts and to the practicing bar by resolving this issue once and for all.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S ESTABLISHED CASE LAW

In addition to the above, the Sixth Circuit's decision as to Ibarra's First Amendment retaliatory termination claim also conflicts with controlling decisions of this Court that recognizes constitutional protection afforded to governmental employees who speak out on matters of public concern not involving personal interests and that are not within the scope of the employee's required job duties. *Garcetti*, *supra*; *City of San Diego v. Roe*, 543 U.S. 77, 123 S. Ct. 521, 160 L. Ed.2d 410 (2004); *United States v. National Treasury Employees Union*, 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995); *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983);

Givhan v. Western Line Consolidated School District, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d. 619 (1979); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

Where the speech is unrelated to the job duties of the public employee and involves a matter of public concern, it appears to be entitled to greater protection, as it is less likely to disrupt the efficient functioning of the workplace. *NTEU*, *513* U.S. at 466. Speech involving a matter of public concern must be protected and the government must have "an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 126 S.Ct. at 1958. Thus, speech made to a public audience, outside the workplace, and involving content largely unrelated to government employment indicates that the employee speaks as a citizen, not as an employee, and speaks on a matter of public concern. *NTEU*, 513 U.S. at 466; *Garcetti*, *supra*; *Williams*, *supra*; *Weisbarth*, *supra*; *Mills*, *supra*; *Freitag*, *supra*; *Green*, *supra*; *Casey*, *supra*: *Battle*, *supra*; *D'Angelo*, *supra*; *Boykin*, *supra*; *Levy*, *supra*; *Ryan*, *supra*.

Turning to the facts in the case at bar, Ibarra was hired by LFUCG as its first Immigration Services Coordinator and started his employment under the direction of Social Services Commissioner, Barbara Curry, during the administration of former Mayor Pam Miller on December 20, 1999. He came to Lexington, Kentucky, from Texas where he had worked as a housing counselor for the Housing Corporation (R.33, Ibarra Dep., Vol. I, pp. 93-94; R.32, Plaintiff's Response to Summary Judgment; Ibarra Resume, Attachment 1).

As the Immigration Services Coordinator, Mr. Ibarra worked under 4 different Commissioners in 3 ½ years. In addition, Ibarra, as an individual citizen, incorporated a separate non-governmental entity called the Cardinal Valley Empowerment Project (hereinafter CVEP) to seek grants and private donations to provide services to the Hispanic community which were not provided by the LFUCG (R.33, Ibarra Dep., Vol. I, pp. 12-14, 28).

On December 24, 2002, an Ibarra's interview was published in a local Spanish newspaper, *El Mundo*. In this interview, Ibarra expressed his concerns over how certain local (nongovernmental) nonprofit service groups in the community were not providing enough services to the largest portion of the local Hispanic community, the Mexican immigrants. Ibarra believed that the Mexican immigrants needed the most help.

In January, 2003, newly elected Mayor Teresa Isaac took office and appointed Alayne White as her new Social Services Commissioner. White was upset with Ibarra over this interview, which again preceded her tenure, and stated that his interview "created quite an uproar" (R. 33, White dep., Vol. I., pp. 243-244). White testified that she was "bombarded" with calls about Ibarra's interview in *El Mundo* and that people were "angry" (R.33, White dep., Vol. I., pp. 243-244). Moreover, White testified that she met in January 2003 with Milton Dohoney, the Chief Administrative Officer for LFUCG, Gerald Smith, the Mayor's Chief of Staff, and Mayor Isaac to discuss this article, the responsive telephone calls and the fact that Ibarra was in a high profile position. White also testified that Mayor Isaac told White to tell Ibarra not to do it again or face termination (R.33, White Dep., Vol. I, pp. 116, 144). White was severely critical of Ibarra for having given this interview without "prior approval" (R.33,

White Dep., Vol. I, p.243; Vol II, pp. 334-336, Exhibit 5, 12-24-02 newspaper article). However, White admitted that she did **not know** if Ibarra had prior approval from the preceding administration to do the interview. In addition, the original translation of the interview was in Spanish, which White admitted she cannot read. White also admitted that she never saw an English translation and that she never showed the article to Ibarra or any translation of said article to Ibarra (R.33, White dep., Vol. III, pp. 463-465).

Immediately prior to giving Ibarra a written reprimand on March 13, 2003, an editorial was published in another Spanish publication, *La Voz*, that was critical of Ibarra's December 24, 2002 interview and questioned the Mayor for funding Ibarra's position (R.33, White dep., Vol. I., pp. 243; Vol. III., pp. 465, 493-497). In response to these publications, White reprimanded Ibarra in writing in a March 13, 2003 memo given to him at a meeting of the same date on the basis that he had not received prior approval for this interview even though his comments were made prior to Mayor Isaac's administration and White taking office (R.33, White dep., Vol. III., pp. 461-465; R.32, Plaintiff's Response to Summary Judgment, March 13, 2003 Reprimand, Attachment 4).

Furthermore, White reprimanded Ibarra and excluded him from meetings as a result of his other opinions he had expressed in another newspaper interview during the prior administration. Before 2003, Ibarra had shared in said interview his concerns about one of the local (nongovernmental) nonprofit agencies, the Hispanic Initiative Network (hereinafter referred to as HIN) (R. 33, White dep., Vol. II., pp. 328, 331). He had publicly expressed views that he disagreed with the direction taken by the HIN Board of Directors with regard to how it performed its services and

how it utilized its grant funding (R.33, White dep., Vol. II., pp. 333-334). White testified that she received calls from HIN members angry with Ibarra over his expressed opinions in this newspaper as well as his expressed opinion in the December 24, 2002 *El Mundo* article (R.33, White dep., Vol. II., pp. 316-317, 323-324, 327-328). White advised Ibarra in the above-mentioned March 13, 2003 disciplinary meeting that he had "pissed off a lot of people". (R.33, Ibarra Dep., Vol. II, p.10).

The content of Ibarra's expressed published opinions rather than procedure was the real motivation behind the actions taken by the Respondents against Ibarra. This was further demonstrated by White's subsequent conduct in "muzzling" Ibarra and restricting him as to press activities. For example, Mayor Isaac Press Secretary Bruce Edwards reported to Ibarra that White was upset with Ibarra for speaking to the press about the positive aspects of the official Mexican government ID, which comments were subsequently published in the local newspaper. Edwards did not think Ibarra's comments were controversial. Ibarra had updated Edwards about this interview in compliance with the Administration's stated policy for employees talking to the press. **Nevertheless, White ordered Ibarra not to talk to the press or media under any circumstances which was much more restrictive than the stated LFUCG policy** (R.33, Ibarra Dep., Vol. I, pp. 175-177; Vol. III, pp. 102-103; 159-160; R. 32, Plaintiff's Response to Summary Judgment, February 7, 2003 Staff Meeting Minutes, Attachment 6).

Turning our attention to the matter involving Paul Brooks, you find another example of content of Ibarra's expressed published opinions rather than procedure was the real motivation behind the actions taken by the Respondents

against Ibarra. Prior to his election to LFUCG council in January 2003, Paul Brooks was interested in hearing from Ibarra about issues and problems in the Cardinal Valley neighborhood. After Brooks was elected to LFUCG council, Ibarra and Brooks discussed in their meeting of January 2003 the possibility of a LFUCG Council resolution that would reflect the LFUCG's disapproval of businesses in the community overcharging Hispanics for tax preparation, ID cards, life-time language lessons, and other services. Ibarra drafted a proposed resolution on these matters (R.33, Ibarra Dep., Vol. I, pp. 99-100; Vol. III, pp. 95-97). Ibarra's proposed resolution for Brooks to present to the LFUCG council was aimed at deterring these abuses of Hispanics in the community. White claimed that Ibarra's drafting of a resolution was "totally inappropriate" and that he was in "non-compliance with expectations" even though he had never been advised that he could not draft a resolution or communicate in such a manner with council-members who were representative of citizenry (R.33, White Dep., Vol. III., pp. 461-465).

Another example of content rather than procedure as the real motivation centers around an incapacitating ice storm that devastated Fayette County on February 14 and 15, 2003. During this ice storm, Ibarra was visited at the Cardinal Valley Center by a Lexington Herald Leader newspaper reporter inquiring about problems related to the ice storm and efforts in the Cardinal Valley area. Subsequently, Ibarra was quoted in the newspaper article discussing serious concerns over the use of alternative dangerous heating methods in the predominately Spanish speaking population in the Cardinal Valley area and Hispanics not understanding the dangers and warnings of burning charcoal in their homes to keep warm. (R. 33, Ibarra Dep., Vol. II, Exhibit 16). Ibarra was reprimanded for this interview which was published in the

Lexington Herald-Leader newspaper during the days immediately following the February 15, 2003 ice storm. White stated that Ibarra had violated the established Administration's stated media contact policy by not getting prior approval before granting this interview. However, **the Administration's stated media contact policy did not require Ibarra to get prior approval**. (R.33, White Dep., Vol. I., pp. 272-274; R. 33, Edwards Dep., pp. 7-9, 22-27).

On March 13, 2003, Ibarra was verbally admonished, criticized and given a written reprimand by Commissioner White, and the Mayor's highest ranking administrative officials, Chief of Staff, Gerald Smith, and Chief Administrative Officer, Milton Dohoney, for engaging in the above-mentioned protected speech related activities. (R.32, Plaintiff's Response to Summary Judgment, March 13, 2003 Reprimand, Attachment 4). In addition, Ibarra was criticized and reprimanded for "noncompliance with expectations" on March 13, 2003 for his verbal and written support of the creation of a health clinic in the Cardinal Valley area even though this health clinic was approved by, initiated and implemented under the **prior administration**. Even though both Mayor Isaac and Commissioner White were not in office at the time the Health Clinic opened, White maintained that Ibarra had "acted out of bounds" (R.33, White Dep., Vol. I., pp. 86-89).

Further, White removed Ibarra from his long term offices at the Cardinal Valley Center and moved him to the downtown offices. As a practical matter, this move significantly limited Ibarra's daily contact with the Hispanic community and impaired his ability to keep abreast of their problems. (R.33, Ibarra Dep., Vol. I, p. 133-134; Vol. III, p. 109). *Compare, Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. __, 126 S.Ct.2405, 165 L.Ed.2d 345

(2006). All actions toward Ibarra by the Respondents as stated above were relevant and competent evidence favorable to Ibarra which was not considered by the lower courts in the case sub judice. *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).

Thereafter, Ibarra was terminated five (5) months following the March 13, 2003 written reprimand. The purported bases for Ibarra's termination were set forth in a memorandum dated August 26, 2003, from Commissioner White which was forwarded to and reviewed by Mayor Isaac before Isaac formally terminated Ibarra on August 27, 2003. (R.33, Ibarra Dep., Vol. III, pp. 123-124; R.32, Plaintiff's Response to Summary Judgment, Exhibit 8, 08-26-03 Memo). According to White, all of the reasons for Ibarra's termination were set forth in this August 26, 2003 memorandum. Significantly, this memorandum specifically referenced the prior March 13, 2003 disciplinary meeting and written reprimand given to Ibarra (R.33, White Dep., Vol. III, pp. 493, 496-498). In addition, White testified that she had discussed the issues related to Ibarra and the March 13, 2003 meeting with Mayor Isaac on more than one occasion, including a formal meeting between White and Isaac to discuss Ibarra's possible termination in June, 2003 (R.33, White Dep., Vol. I, pp. 130-132, 144). White also attached the March 13, 2003 written reprimand given to Ibarra to the August 26, 2003 memorandum recommending Ibarra's termination (R.33, White Dep., Vol. I, pp. 168-169). This March 13, 2003 meeting and written reprimand were still being presented as evidence by the Respondents as justification for Ibarra's termination on grounds of misconduct at Ibarra's unemployment hearing six (6) months **after** he was terminated (R.9, Attachment "A" to Defendants' Memorandum in Support of Motion to Dismiss; R33, Ibarra

Dep., Vol. III, pp. 123-124). Accordingly, the hard documented evidence of record establishes a **clear causal nexus** between the March 13, 2003 reprimand of Ibarra for his protected speech activities, and his subsequent termination five (5) months later on August 27, 2003. *Garcetti v. Ceballos*, 547 U.S. ____, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).

As demonstrated above, Ibarra's speech expressions were clearly of public concern and were not made pursuant to his official job duties. Thus, it is clear that the First Amendment protects his speech expressions even if this speech may have been indirectly concerned with the subject matter of his employment, *Garcetti*, *supra*; *Skehan*, *supra*; *Cioffi*, *supra*; *Foraker*, *supra*; *Hill*, *supra*; *Campbell*, *supra*; *Williams*, *supra*; *Weisbarth*, *supra*; *Mills*, *supra*; *Bailey*, *supra*; *Bradley*, *supra*; *Freitag*, *supra*; *Green*, *supra*; *Casey*, *supra*: *Battle*, *supra*; *D'Angelo*, *supra*; *Wilburn*, *supra*; *Boykin*, *supra*; *Levy*, *supra*; *Ryan*, *supra*.

In summary, review by this Court is necessary to address and to correct the Sixth Circuit's decision in the case at bar because it conflicts with this Court's decision in *Garcetti*, *supra*. Moreover, The Sixth Circuit's decision applied an unwarranted and overly expansive interpretation of *Garcetti*, *supra*, beyond the holding of this Court. Thus, the Sixth Circuit's decision in the case at bar makes consideration by this Court of utmost importance in order to secure and maintain uniformity in the Court's decisions.

III. THE SIXTH CIRCUIT'S DECISION CONTRAVENES WELL ESTABLISHED STANDARDS OF APPELLATE REVIEW AND SUMMARY JUDGMENT STANDARDS.

In reviewing the record on a grant of summary judgment, the court "must view the facts and any inferences reasonably drawn from them in the light most favorable to the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Additionally, summary judgment is appropriate only where **"the pleadings**, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, **show that there is no genuine issue as to any material fact" as to an essential element of the non-moving party's case. (Emphasis Added).** Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co., supra*. Summary judgment is only appropriate if, viewing the facts and inferences in the light most favorable to the nonmoving party, evidence is so lacking that it would be impossible for a "reasonable jury [to] return a verdict for the nonmoving party." *Matsushita Elec. Indus. Co., supra*.

Turning to the case at bar, first, the Sixth Circuit's opinion cites to Ibarra's Complaint and Amended Complaint to conclude the following:

> In light of the United States Supreme Court's recent decision in *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), we conclude that Ibarra has failed to establish that the speech he highlights was entitled to protection under the First and Fourteenth Amendments to the United States Constitution. It thus becomes unnecessary to review the propriety of the district court's determination that the plaintiff failed to

> establish a temporal link between the speech in question and his eventual termination. Moreover, we agree that the district court's rulings on the questions of the alleged infringement of the plaintiff's right of association and the allegation of defamation were correct in all respects and, therefore, affirm those rulings for the reasons given in the district court's memorandum opinion. (App. C, 6a). ...Consequently, the comments made by the plaintiff constituted no more than a part of the performance of the tasks that he was hired and paid to complete." (App. C, 13a).

Specifically, the Court cites support for its aforementioned conclusion paragraphs 15-19 of the Appellant's Complaint and paragraphs 15-19 of the Amended Complaint. (Compare, Complaint, R.1, and Amended Complaint, R. 3, with Per Curiam Opinion, App. C, 12a-13a). The Sixth Circuit's conclusion of law ignored the fact that the Respondents disputed and denied these material allegations in paragraphs 14-15 of their Answer to the Amended Complaint (Answer of Defendants, R. 14). A copy of Ibarra's aforementioned allegations is set forth in App. G, 45a-46a. A copy of the Respondents' aforementioned denials is set forth in App. H, 47a-48a. For the Court's convenience, Ibarra's Count I paragraphs number 14-15 in both his Complaint and Amended Complaint states the following:

> 14. Ibarra was employed as the Coordinator of Immigrant services for the Defendant, Lexington-Fayette Urban County Government (hereinafter referred LFUCG) from on or about December 20, 1999 until the date of his wrongful involuntary termination on or about August 27, 2003.

15. Ibarra's duties and responsibilities throughout his employment as Coordinator of Immigrant Services included, but not exclusively, the following: to act as liaison for the LFUCG with the Hispanic community and to promote institutional changes and updates; to improve service delivery to the Hispanic community; to implement educational programs; to achieve cultural competence within the comprehensive service being provided to the community such as health, education, mental health, police services, and all other fields relevant to the improvement and support of the Hispanic community as a whole; to ensure that the Hispanic community made a smooth transition into the educational, social and economic infrastructure of the community as a whole; and to ensure that they affirmatively availed themselves of the rights and protections of the legal and justice system operating within the commonwealth of Kentucky. (App. G, 45a-46a).

In contrast, the Respondents' Answer [to Amended Complaint] states the following in paragraphs number 14-15:

14. Regarding the averments in paragraph 14 of the amended complaint, the defendants admit that Ibarra was an employee of the LFUCG from on or about December 20, 1999 until on or about August 27, 2003. The defendants deny that Ibarra was wrongfully terminated. The defendants are without knowledge or information sufficient to form a belief as to the truth of all other averments in paragraph 14 of the amended complaint.

15. Regarding the averments in paragraph 15 of the amended complaint, the defendants affirmatively state

> that Ibarra's job duties and responsibilities were only those described in the job description for his position, and therefore deny all averments in paragraph 15 of the amended complaint inconsistent with that job description. (App. H, 47a-48).

Additionally, the Sixth Circuit's opinion ignored the fact that Ibarra was never given, verbally or in writing, any written job description or job requirements according to the Respondents' own testimony (R.33, White dep., Vol. I., pp. 176-177; Vol. III, pp. 531-532), which also conflicted with the Respondents' assertion in their aforementioned Answer. Furthermore, the Sixth Circuit ignored that the speech activities engaged in by Ibarra and which formed a significant basis for his termination were activities **not** part and parcel of any job duties according to the Respondents. For example, White claimed that Ibarra's drafting of a resolution was "totally inappropriate" (R.33, White dep., Vol. III., pp. 461-465). White also complained to Mayor Isaac and to Ibarra that Ibarra had "acted out of bounds" in regard to the opening of a Health Clinic even though both Mayor Isaac and Commissioner White were not in office at the time the Health Clinic opened, (R.33, White dep.). White even criticized Ibarra's going door-to-door in the heavily Hispanic populated subdivisions during the February, 2003 ice storm to tell people of the dangers and hand out pamphlets in Spanish, stating such actions were "inappropriate". Similarly, White stated that Ibarra's request to the LFUCG's Emergency Operations Center during the ice storm aftermath, for possible National Guard assistance was "out of line". (R.33, White dep., Vol. I., pp. 263, 262, 272). All of Ibarra's aforementioned expressions of speech were claimed by the Respondents to be outside the scope of his job duties and claimed by Respondents to be a basis for his termination.

Thus, the Sixth Circuit relied on disputed issues of material facts to support its decision to affirm the district court's grant of summary judgment on Ibarra's First Amendment retaliatory discharge claim. Therefore, the Sixth Circuit's decision conflicts with the well established federal summary judgment standard of Fed. R. Civ. P. 56(c) and *Matsushita Elec. Indus. Co.*, *supra*, and makes it ripe for review by this Court.

In summary, Respondents produced no evidence whatsoever that Ibarra's speech activities were "part and parcel" of his job duties. In fact, the testimony of Commissioner White clearly evidences that Ibarra's speech activities for which he was reprimanded, and ultimately terminated, were not considered by LFUCG to be necessary functions of his job duties as Immigrant Services Coordinator.

CONCLUSION

For the foregoing reasons, Ibarra respectfully requests that his petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit be granted.

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